

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

Petition for Preemption of Article 52 of the
San Francisco Police Code Filed by the
Multifamily Broadband Council

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) MB Docket No. 17-91
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REPLY COMMENTS OF ESSEX PROPERTY TRUST, INC.

ESSEX PROPERTY TRUST, INC. (“Essex”) hereby submits these reply comments in support of the Petition for Preemption of Article 52 of the San Francisco Police Code (“Petition”) filed by the Multifamily Broadband Council (“MBC”). Essex strongly supports the comments filed by others who support the Petition, including without limitation the National Multifamily Housing Council (“NMHC”). Essex respectfully asks that the Commission grant the Petition because Article 52 of the San Francisco Police Code effectively discourages facilities-based competition and infrastructure investment in multiple dwelling unit (“MDU”)¹ buildings for the reasons set forth herein.

1. Essex Property Corporation was established in 1971 and transitioned into a publically traded real estate investment trust in 1994 with a portfolio at the time of 16 multi-family communities located on the West Coast. Today, Essex is headquartered in San Mateo, California. Essex acquires, develops, redevelops and manages 250 communities totaling

¹ An MDU is a centrally managed real estate development, such as an apartment building, condominium building or cooperative, gated community, mobile home park, or garden apartment. See 47 C.F.R. § 76.2000(b).

60,487 units in California and Washington. Essex currently owns 5 communities (1,558 units) in the City of San Francisco and an additional 545-unit complex is currently under construction at Folsom Street of San Francisco. The development is scheduled for completion in 2019.

2. Essex agrees with the comments filed by Prometheus Real Estate Group, Inc. (“Prometheus”) and other commentators that the FCC should preempt Article 52 because it interferes with the federal regulatory framework for competitive access to inside wiring where the FCC “occupies the field,” and it conflicts with federal law and policy. The FCC has acted to remove regulatory barriers to broadband deployment at the federal, state and local levels. This local ordinance, despite its stated goal, is a barrier to investment and broadband expansion because it disincentives infrastructure deployment and wiring upgrades at MDUs effectively reducing competition.

3. Essex, like Prometheus and other commentators, works with multiple providers to deliver competitive communications services and choice to our residents. Essex agrees with the comments filed by Prometheus that Article 52 will interfere with current agreements and impact future agreements with service providers. Essex ensures that residents have a minimum of two providers available to them for their telecommunications needs and, as part of Essex’s agreements with the providers, Essex tries to ensure that the level of service received by the residents is the highest quality available in the area. Essex also agrees with the comments filed by a number of

commentators² and is highly concerned that Article 52 will create a disincentive for both service providers and property owners to invest in new or upgraded wiring and other infrastructure. Any decrease in infrastructure investment and wiring upgrades will negatively impact the quality of service that residents of Essex's properties currently receive and will decrease the competitive choices for services that residents will receive in the future.

4. Essex is concerned that Article 52 will negatively impact the services available to residents in the following specific ways:

- i. Essex agrees with the comments filed by NMHC that Article 52 raises serious technical concerns.³ Essex takes responsibility for all Minimum Point of Entry (MPOE), Main Distribution Frame (MDF), and Intermediate Distribution Frame (IDF) closets at all Essex locations. These responsibilities include maintenance, repairs and upgrades of certain facilities in these locations. Article 52, which allows multiple providers to gain unbridled access to these locations and to wiring owned by property owners, raises major concern about wiring labeling and how service providers will be able to determine what is an "active" line (one that is being used by another service provider to deliver service to a resident) and what is an "available" line. Essex is highly concerned that unmanaged access to wiring as contemplated by Article 52 will

² See, for example, comments filed by Data Stream, NCTA – The Internet & Television Association, AvalonBay Communities, Inc., Camden Property Trust, Holland Partner Group, and RealtyCom Partners.

³ See Section VI of NMHC's comments and supporting Declaration of Richard Holtz, President of InfiniSys, Inc.

result in service disruption to residents and potential disruption to life-safety lines owned by Essex, leading to potentially dangerous conditions for our residents and employees.

- ii. Essex has already received resistance from communication providers who serve Essex's residential MDUs in the City of San Francisco to renew or negotiate new service agreements which may result in reduced services to the residents.
- iii. The adoption of Article 52 has already delayed Essex's ability to finalize service provider contracts in the City of San Francisco for a residential community under construction because the providers have told us it is unclear to them how they will be able to justify a large capital cost in light of the government-mandated "forced access" requirements of Article 52.
- iv. At many communities, Essex provides power and cooling to MPOE rooms and to MDF and IDF closets. Should a communications provider install equipment in these locations as contemplated by Article 52, Essex is concerned such equipment (and/or the actions of the service provider who installed such equipment) could severely affect Essex's ability to maintain a proper environment and affect the ability to support life safety systems.
- v. Warranties at Essex's new developments or redeveloped communities may be voided should any communications provider who gains access to such properties pursuant to Article 52 alter or attach to existing systems or cause damage to rooftop surfaces.

- vi. Telecom closet locations at Essex's communities are secure and equipped to handle access control systems, fire control, video surveillance and network access. These systems would potentially be at risk if service providers gain access to these locations pursuant to Article 52 without contractual obligations and insurance protection.

5. Essex strongly disagrees with the comments filed by The Fiber Broadband Association ("FBA") that claim Article 52 is an improvement on other mandatory access laws and provides "landlords with numerous protections." FBA sites a number of provisions in Article 52 to be emblematic of these protections, including "reasons of limited space, safety, and interference with incumbent service providers and other essential services." These so-called "protections" are specious as there is no method, short of expensive and time-consuming legal action, to ascertain the exact meaning of the many vague terms that are used in Article 52. Among the so-called "protections" in Article 52 are the following vague provisions:

- i. A property owner may require a service provider to "conform to such reasonable conditions as the property owner deems necessary to protect the safety, functioning, and appearance of the property and the convenience and well-being of the occupants." What happens when a property owner provides a list of such "reasonable conditions" to a service provider who disagrees that the list is "reasonable" or that the conditions are "necessary to protect the safety, functioning, and

appearance of the property and the convenience and well-being of the occupants?” A dispute over these terms could well lead to a court battle.

ii. A property owner may refuse access to a service provider if the property owner can show that “physical limitations” prohibit the provider from installing facilities in existing space. What happens when a property owner shows a service provider what the property owner considers to be “physical limitations” and the service provider disagrees? Again, what is and is not a “physical limitation” is ripe for litigation.

iii. A property owner may also refuse access to a service provider if the provider’s proposed installation of facilities would have “an adverse impact” on any historically or “architecturally significant elements” of the Property. What precisely constitutes an “adverse impact” and/or an “architecturally significant element” are questions that can probably only be answered by a court of law.

iv. Similar other so-called “landlord protections” also suffer from this issue of vagueness. A property owner can refuse access to a service provider if it would have a “significant, adverse effect” on an existing provider’s services. But what exactly amounts to a “significant, adverse effect” on the ability of an existing provider to provide services to a Property? Is it a “significant, adverse effect” if the existing service provider can no

longer use property-owner owned wiring on an exclusive basis -- which is a condition that is rendered unenforceable by Article 52 even though most property owners and many service providers believe it is necessary in order to maintain the integrity of the services received by residents?


- v. What does the term “impair the use of the property for the continued provision of any existing essential services” mean if a property owner refuses access to a service provider on those grounds?

If there is a dispute, these vague terms in Article 52 can be sorted out only through costly and time consuming litigation. Similarly, the provision in Article 52 that addresses “just and reasonable compensation to the property owner” is another element of the ordinance that will keep lawyers busy but will not help improve services for residents of Essex’s properties. These protections are not only vague, they also carry great risk to any property owner who actually attempts to invoke them given the civil penalties and court costs that may be imposed upon a property owner under the onerous enforcement mechanisms in Article 52.

Rather than engage in prolonged, expensive, and risky litigation to work through the maze of vague terms contained in Article 52, Essex strongly believes that open free market contract negotiations between property owners and service providers are a much better way to ensure quality of services for residents of MDUs.

For the reasons stated above, Essex respectfully urges the Commission to grant the
Petition and preempt Article 52

Respectfully Submitted,



Jonas D. Bordo
Group Vice President, Operational Services

Date

June 7, 2017